



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sidelle Wertheimer - Erroneous FICA Deductions -
Waiver - Statute of Limitations

File: B-202983.2

Date: November 16, 1988

DIGEST

1. An agency erroneously deducted FICA taxes instead of Civil Service Retirement from an employee's salary. In the prior Comptroller General decision regarding this matter it was held that the erroneous FICA deductions should be recovered and paid into the Civil Service Retirement Fund. The agency never received the employee's letter authorizing the refund of the FICA amount from the Internal Revenue Service (IRS). Inasmuch as the IRS is bound by a 3-year statute of limitations when acting on claims submitted by federal agencies for refunds of erroneously paid FICA taxes, and more than 3 years have passed, the agency is now unable to recover the FICA taxes erroneously deducted from the employee's salary.

2. In a prior decision we held that the erroneous overpayment representing the difference between FICA and Civil Service Retirement deductions from an employee's salary may be subject to waiver under 5 U.S.C. § 5584 (1982) and remanded the question to the agency for waiver determination on the merits. The agency took no action since it did not receive the employee's letter requesting waiver. The prior decision in this case may be considered as initiating the waiver process, thus tolling the 3-year limitation period in 5 U.S.C. § 5584, and waiver consideration may proceed under 4 C.F.R. § 92.1 (1988).

DECISION

This is in response to a request from the Director, Personnel Systems and Payroll Division, Department of Housing and Urban Development (HUD), for a decision concerning the agency's authority to take the corrective action we recommended in a prior decision. The decision concerned the erroneous withholding of Federal Insurance Contributions Act (FICA) deductions rather than Civil Service Retirement

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deductions from the salary of Ms. Sidelle Wertheimer, and the resulting overpayment of salary to her. Inasmuch as 6 years have passed since that decision was rendered and no action has been taken, the Director asks what action the agency now should take. For the reasons stated below, we conclude that the statute of limitations has expired for purposes of recovering the FICA contributions from the Internal Revenue Service, but HUD may still consider the amount of the erroneous overpayment of salary for waiver.

BACKGROUND

Ms. Wertheimer was employed by HUD in January 1980 on a term appointment following her employment by another federal agency. However, since she was selected from a certificate of eligibles, she was processed as a new employee with FICA coverage. Based upon her prior employment, Ms. Wertheimer should have continued to be covered under Civil Service Retirement. The error was discovered in November 1980, and the agency requested our decision as to what corrective action should be taken.

In our decision B-202983, March 10, 1982, we held that the erroneous FICA deductions should be recovered and paid into the Civil Service Retirement Fund. We advised that the employee must agree in writing to permit the agency to obtain, to the extent possible, a refund of the FICA amount from the Internal Revenue Service (IRS). The employee must state that she has not claimed and will not claim a refund or credit of the amount of the erroneous FICA deduction, or if she has made a claim, she must identify and return to the agency any amounts refunded or credited or state that her claim has been rejected.

Further, we held that the difference between FICA and Civil Service Retirement deductions constitute an erroneous overpayment of pay to Ms. Wertheimer which may be subject to waiver under the provisions of 5 U.S.C. § 5584 (1982) and 4 C.F.R. Part 91 (1981). Since we did not have a full report as to the facts concerning the overpayment and the amount in question did not exceed \$500, we remanded the question of waiver to the agency for its determination whether to grant waiver in this case.

In April 1982, the agency advised Ms. Wertheimer, in writing, of the decision. She was advised to: (1) request in writing that HUD obtain a refund of the erroneous FICA taxes from the IRS; and (2) either refund to HUD the amount of \$139.81, which represented the difference between the FICA and Civil Service Retirement employee deductions, or request a waiver of the collection of the overpayment.

On April 20, 1988, Ms. Wertheimer wrote to HUD inquiring about this matter. She states that she applied for corrective action and a waiver when she received the agency's letter of April 30, 1982, and received no reply. However, the agency has no record of having received her request.

The agency now questions whether there is authority to make the corrective actions in this case, since the IRS is bound by a 3-year statute of limitations when acting on claims by federal agencies for refunds of erroneously paid social security taxes. Further, the agency notes that the waiver provision under 5 U.S.C. § 5584 requires that a request for waiver must be filed within 3 years from the date the error was discovered.

OPINION

Claims for refunds of erroneously paid FICA taxes are primarily matters for consideration by the IRS and not our Office. See 26 U.S.C. §§ 3102, 3111, 3112, 6301, 6302, 6401 and 6402, Internal Revenue Code of 1954, as amended; Patricia J. Engevik, B-202201, Dec. 23, 1981. We have previously recognized the general position taken by the IRS that it is bound by the 3-year statute of limitations prescribed by 26 U.S.C. § 6511 when acting on claims submitted by federal agencies for refunds of erroneously paid FICA taxes. See Engevik, *supra*; John C. Edwards, B-184003, July 13, 1976. Hence, since more than 3 years have passed, it appears that HUD would now be unable to recover the FICA taxes erroneously deducted from Ms. Wertheimer's salary.

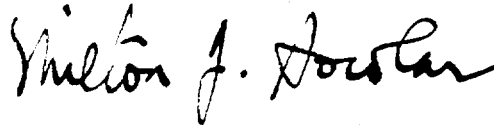
Regarding the statute of limitations for the exercise of waiver authority, 5 U.S.C. § 5584(b) provides that the Comptroller General or the Secretary concerned may not exercise his authority under that section to waive any claim if application for waiver is received in his Office after the expiration of 3 years immediately following the date on which the erroneous payment of pay or allowances was discovered. Regulations implementing the statute contain similar language at 4 C.F.R. § 91.5 (1988).

Neither the law nor the implementing regulations require any specific form or language which would constitute an "application" for waiver. Since the law was intended to be beneficial to those requesting waiver, it should be liberally construed to carry out that intent, when possible.

Further, 4 C.F.R. § 92.1 provides that in the absence of an application for waiver, "either the Comptroller General of the United States, the Secretary concerned or the head of

the agency which made the erroneous payment of pay or allowance may initiate the waiver procedures prescribed in these regulations." See also Texas State Court Juror Fees, B-219496, Jan. 22, 1986.

In this case, we initiated waiver action in the decision dated March 10, 1982, when we held that there was an erroneous payment made to Ms. Wertheimer and remanded the case to the agency for investigation and disposition. Since the action by this Office was within 3 years from the date of discovery of the error, the requirements of the statute of limitations for waiver authority have been met.^{1/} Accordingly, HUD should now continue the process by considering whether waiver of the erroneous overpayment should be granted on the merits.

for 
Comptroller General
of the United States

^{1/} Cf. 54 Comp. Gen. 644 (1975), holding that a prior denial of a timely filed waiver request may be reconsidered although the request for reconsideration was received after expiration of the 3-year period.